Supreme Court, U.S.
FILED
DEC 13 1995
CLERK

No. 95-601

In The

Supreme Court of the United States

October Term, 1995

LOWSLEY-WILLIAMS AND COMPANIES, ET AL.,

Petitioners,

v.

RAYTHEON COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California First Appellate District, Division Five

BRIEF FOR RESPONDENT IN OPPOSITION

THOMAS M. PETERSON
BROBECK, PHLEGER & HARRISON
One Market, Spear Tower
San Francisco, CA 94105
Telephone: 415-442-0900

Attorneys for Respondent Raytheon Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS RESTATED

1. When an insurer disobeys state law by transacting insurance without a state license, through an unlicensed broker, may the state require the insurer to either obtain an insurance license or else post a bond before the insurer can defend a suit brought on a policy that was issued by the insurer in violation of state law?

2. Have petitioners preserved any substantial constitutional question in view of their concession in the California courts that the Due Process Clause would not be violated if a state insisted that an unlicensed insurer post a bond as a precondition to defending a suit brought on a policy of insurance that was issued illegally, in violation of state insurance law?

3. Does this Court have jurisdiction over an interlocutory state court ruling which determined that petitioners transacted insurance in California, in violation of state law, when it has yet to be determined in state court whether petitioners will purge themselves of the state court ruling by (a) obtaining a state license to transact insurance business, or (b) posting a bond in an amount which remains to be determined in state court after discovery and a further hearing?

RULE 29.6 STATEMENT

Raytheon Company is a publicly held corporation organized under the laws of the State of Delaware with its headquarters located in Lexington, Massachusetts. Ratheon stock is traded on the New York Stock Exchange. None of Raytheon's affiliated or subsidiary entities issues shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS RESTATED i

RULE 29.6 STATEMENT ii

STATEMENT 3

A. California's System of Insurance Regulation 3

B. Background Facts Culminating in Insurance Coverage Litigation in California State Court..... 6

C. Facts Concerning the California Court of Appeal Decision That Petitioners Would Have This Court Review 8

1. Raytheon's Motion in the State Trial Court and the Evidence Relating to That Motion.. 8

2. The State Trial Court's Findings and Order, Including a Description of Further Proceedings Yet to Occur in the State Trial Court Related to the Subject of Raytheon's Motion 10

3. Proceedings in the California Appellate Court Leading to the Written Opinion of the California Court of Appeal..... 11

4. The Actual Decision of the California Court of Appeal, Including the Limits and Analysis in That Decision..... 12

D. Proceedings After the Court of Appeal Decision Leading to the Petition for Writ of Certiorari..... 14

REASONS TO DENY THE WRIT 17

A. Applying the Rule 10(c) Criteria, There Is No Basis for Certiorari. There Is No Conflict with Any Decision of This Court. There Is No Important, Properly Presented Question of Federal Law 17

TABLE OF CONTENTS – Continued

Page

1. A Settled Line of Supreme Court Precedent Is Consistent with the Rulings of the California Courts 18

2. Petitioners' Assertion of a Property Interest Impaired Without Procedural Due Process Is Wishful and Trivial in View of the Rulings of the California Courts 19

3. The Question Presented by the Petition Is Insubstantial in View of Petitioners' Concessions Below that Insurance Code § 1616 Could Be Constitutionally Applied to an Insurance Transaction that Is Unlawful Under State Law 20

4. Petitioners' Current Theory of Constitutional Deprivation Was Waived During Proceedings in State Court..... 22

5. Petitioners' Theory of Constitutional Deprivation Rests on Misapprehensions of Law and Fact 24

6. There Is No Merit in Petitioners' Other Assertions of Conflict with This Court's Precedents..... 25

B. Applying the Rule 10(b) Criteria, There Is No Basis for Certiorari. There Is No Conflict Between the California Court Decision and the Decision of Any Other Court 27

C. Certiorari Should Also Be Denied Because Petitioners Have Not Established Jurisdiction in This Court 28

CONCLUSION 30

INDEX OF AUTHORITIES

Pages

CASES

Bank of San Pedro v. Forbes Westar, Inc., 53 F.3d 273 (9th Cir. 1995) 6, 24

Beck v. Washington, 369 U.S. 541 (1962) 22

Bell v. Burson, 402 U.S. 535 (1971) 25

Board of Regents v. Roth, 408 U.S. 564 (1972) 20

Bothwell v. Buckbee-Mears Co., 275 U.S. 274 (1927) 19

Chattanooga Nat'l Bldg. & Loan Ass'n v. Denson, 189 U.S. 408 (1903) 19

Church of Christ in Lexington v. St. Paul Surplus Lines Ins. Co., 494 N.E.2d 45 (Mass.App.Ct. 1986) 9

Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964) 18

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 28, 29, 30

Connecticut v. Doehr, 501 U.S. 1 (1991) 26

County of Sacramento v. Loeb, 160 Cal.App.3d 446, 206 Cal.Rptr. 626 (1984) 23

Eli Lilly & Co. v. Sav-on-Drugs, Inc., 366 U.S. 276 (1961) 19

Evans v. Unemployment Ins. Appeals Board, 39 Cal.3d 398, 703 P.2d 122, 216 Cal.Rptr. 782 (1985) 24

Fuentes v. Shevin, 407 U.S. 67 (1972) 26

German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914) 3

INDEX OF AUTHORITIES – Continued

Page

Hitachi Zosen Clearing, Inc. v. Tek-Matik, Inc., 846 F.2d 27 (6th Cir. 1988) 30

Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943) 18

Interstate Amusement Co. v. Albert, 239 U.S. 560 (1916) 19

Isaacson v. California Ins. Guar. Ass'n, 44 Cal.3d 775, 750 P.2d 297, 244 Cal.Rptr. 655 (1988) 5

Kowis v. Howard, 3 Cal.4th 888, 838 P.2d 250, 12 Cal.Rptr.2d 728 (1992) 11

Mid-American Indemnity Ins. Co. v. King, 1995 Tex. LEXIS 123 (Tex. July 7, 1995) 27

Osborn v. Ozlin, 310 U.S. 53 (1940) 18

Ownbey v. Morgan, 256 U.S. 94 (1921) 26

Perry v. Sindermann, 408 U.S. 593 (1972) 15, 23

Popelka, Allard, McCowen & Jones v. Superior Court, 107 Cal.App.3d 496, 165 Cal.Rptr. 748 (1980) 12

Richmond v. Dart Industries, Inc., 196 Cal.App.3d 869, 242 Cal.Rptr. 184 (1987) 22

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 26

State Board of Ins. v. Todd Shipyards, 370 U.S. 451 (1962) 26

Trihedron Int'l Assurance, Ltd. v. Superior Court, 218 Cal.App.3d 934, 267 Cal.Rptr. 418 (1990) .. *passim*

Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944) 19

INDEX OF AUTHORITIES – Continued

Page

United States v. James Daniel Good Real Property, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) 26

Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) 18

STATUTES & RULES

15 U.S.C. § 1012(a) 4

28 U.S.C. § 1257 28

28 U.S.C. § 1291 28

U.S. Supreme Court Rule 15.2 3

California Code of Civil Procedure

§ 1033.5(a)(6) 27

California Rules of Court

Rule 977(a) 1

California Insurance Code

§ 35 5

§ 700 5

§ 700.01 5

§ 700.05 5

§ 700(a) 4

§ 703 4

§ 1611 4

§ 1616 ..... *passim*

INDEX OF AUTHORITIES – Continued

Page

§ 1620(a) 9
§ 1760.5 9
§ 1761 ..... 6, 9
§ 1763 ..... 6, 9
§ 1764.1 6
§ 1765 6
§ 1768 6
§ 1770 6
§ 1774 6
§ 1775.5 6

BRIEF FOR RESPONDENT IN OPPOSITION

The petition does not present any substantial, properly preserved constitutional question.

The unpublished, non-precedential decision of the California Court of Appeal in this case is not in conflict with any other, lower court decision.[1] More than forty states have statutes that require an insurance company to post a bond or obtain a license when a policyholder sues a carrier who has transacted unlicensed insurance business within the state in violation of state insurance law. The lower courts have consistently held such statutes to be constitutional.

This Court's due process precedents are in full accord. States may, under the Due Process Clause, (a) condition the transaction of insurance on state licensing, (b) penalize unlicensed insurance transactions, and (c) close state courts to insurers who assert rights under insurance transactions that were not conducted in compliance with state insurance laws.

The petition simply ignores what the California courts determined state law to be. The California courts ruled that petitioners transacted insurance business in California even though they did not meet the requirements of state insurance law. In particular, the California courts specifically determined that petitioners were not qualified under California law to transact insurance as

---

[1] "An opinion that is not ordered published shall not be cited or relied on by a court or party in any other action or proceeding except as provided in subdivision (b)." Rule 977(a), Cal. Rules of Court.

unlicensed, surplus line insurers. These determinations of state law are controlling. They establish that petitioners do not now have, and never have had, any "right" to transact surplus line insurance in California. California could not unconstitutionally impair a non-existent "right." California has simply asserted its undoubted power to regulate the insurance business and curtail violations of state insurance licensing laws. California only exercised that power after petitioners had a full hearing, with evidence, on the question of whether they violated California's insurance laws.

If statutes closing courts to unlicensed insurers did present, potentially, some question under the Fourteenth Amendment, petitioners have not preserved any such question for this Court's review. Petitioners conceded in the California courts that the state could constitutionally require an insurance company to obtain a license or post a bond before defending a suit on a policy that was illegally issued, in violation of state law. Thus, when the California courts specifically found that petitioners "transacted" insurance in violation of California law, petitioners' constitutional claim was washed away by their own concession about the reach of the Fourteenth Amendment.

Finally, petitioners have failed to demonstrate that this Court has jurisdiction over the petition. Thus far, the California courts have determined that petitioners transacted insurance in California in violation of state law regulating insurers. If petitioners secured a license to transact insurance business, petitioners would not need to post any bond. And even if petitioners do not obtain a

license, the California courts have yet to decide what the amount of any posted surety bond would have to be. Nothing in the record indicates that any bond, even a large one, would actually impair in any way petitioners' ability to defend themselves. In fact, under California law, if petitioners post a surety bond, and prevail in the state court litigation, they may recover the cost of the bond premium.

For these and other reasons, discussed more fully below, the petition should be denied.

STATEMENT

The petition contains incomplete and inaccurate statements about California law, the course of proceedings in the California courts, and the findings of fact that formed the basis for the interlocutory order that petitioners would have this Court review. Rule 15.2 requires a more accurate and complete description of proceedings in the California courts.

A. California's System of Insurance Regulation

Petitioners are Lloyd's, London underwriters and London Market Insurance Companies who sell commercial liability insurance for profit. States have broad police power to regulate commercial business activities. Such state power is most far-reaching when the business implicates the public interest, as insurance does. *See German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 413 (1914). States can and do impose close regulation of various aspects of

the insurance business, ranging from solicitation of potential policyholders to the investigation and payment of claims.[2]

California regulates the insurance business through a comprehensive statutory scheme contained in the California Insurance Code.[3] All "transaction" of insurance in California is *unlawful* except to the extent authorized by statute. *See* Insurance Code §§ 700(a), 703. Insurance Code § 1611 lists acts that "involve transacting insurance in California":[4]

> (1) The issuance or delivery to residents of, or to corporations authorized to do business in, this State of contracts of insurance insuring (a) the lives or persons of residents of this State physically present herein at the time of such issuance or delivery or (b) property or operations located in this State.
>
> (2) The solicitation of applications for such contracts.

---

[2] Congress has sanctioned broad state power over the insurance business by enacting the McCarran-Ferguson Act. The Act eliminates any argument that state regulation of insurance unduly burdens interstate commerce. *See* 15 U.S.C. § 1012(a).

[3] We reprint in an appendix certain sections from the California Insurance Code that are important to an understanding of this case and not otherwise quoted in the text of this brief. The appendix to the petition is cited as "App."

[4] *Trihedron Int'l Assurance, Ltd. v. Superior Court*, 218 Cal.App.3d 934, 945, 267 Cal.Rptr. 418 (1990), held that Insurance Code § 1611 lists acts constituting transaction of insurance in California.

(3) The collection of premiums, membership fees, assessments or other considerations for such contracts.

(4) Any other transaction of business arising out of such contracts.[5]

An insurer can acquire the right to transact insurance in California by obtaining "admission" (a license) from the California Insurance Commissioner. *See* Insurance Code § 700. An *admitted* insurance carrier must maintain minimum capitalization, file periodic reports with the Commissioner, pay taxes on premium income, and pay assessments to the California Insurance Guarantee Association (CIGA). *See* Insurance Code §§ 700.01, 700.05; *Isaacson v. California Ins. Guar. Ass'n*, 44 Cal.3d 775, 784, 750 P.2d 297, 244 Cal.Rptr. 655 (1988). CIGA provides insurance protection to Californians who have the misfortune of holding insurance policies issued by insolvent, admitted carriers. Thus, by requiring insurers to be licensed or admitted, California assures the broadest participation in the state program protecting policyholders against insurer insolvency.

In one circumstance, insurance may be lawfully transacted in California even though the insurer who issues the policy is not admitted (licensed) by the Insurance Commissioner. This is possible when the facts of the

---

[5] "Transaction" of insurance is also defined in Insurance Code § 35. "Transaction" includes: (a) Solicitation. (b) Negotiations preliminary to execution. (c) Execution of a contract of insurance. (d) Transaction of matters subsequent to execution of the contract and arising out of it."

transaction fall within a statutory "safe harbor" covering the transaction of surplus line insurance.

California regulates surplus line insurance transactions by licensing and regulating *the brokers* who place the insurance with the unlicensed or nonadmitted carriers. Under California law, a surplus line insurance transaction with a nonadmitted insurer is only proper if the surplus line broker has been licensed by the California Insurance Commissioner. Insurance Code §§ 1761, 1763, 1765; *Bank of San Pedro v. Forbes Westar, Inc.*, 53 F.3d 273, 276 (9th Cir. 1995). In addition to the necessity of using a licensed broker, California places other restrictions on surplus line insurance placements. For example, the broker must prepare and maintain reports concerning the sale of surplus line policies. The broker must pay quarterly taxes based on premiums received from the sale of such policies. Issued surplus line policies must satisfy various form and content requirements. And before selling a surplus line policy, the broker must attempt, unsuccessfully, to place the coverage with a carrier who is admitted to transact insurance in California. *See* Insurance Code §§ 1763, 1764.1, 1768, 1770, 1774, 1775.5.[6]

B. Background Facts Culminating in Insurance Coverage Litigation in California State Court

Raytheon Company is headquartered in Massachusetts. Since 1944, Raytheon has done business in California. Raytheon's semiconductor facility in the San

---

[6] The surplus line broker must also satisfy various licensing requirements. *See, e.g.*, Insurance Code § 1765.

Francisco Bay Area, at Mountain View, employed 850 people and generated over $90 million in sales in 1992. App. 11a-12a.

Raytheon faces claims of liability as a result of environmental contamination allegedly present at the Mountain View facility. Raytheon tendered these claims to its insurer, Continental Casualty Company. Continental had issued to Raytheon primary and first-level excess liability insurance policies providing $10 million worth of coverage for the period April 1, 1984 to April 1, 1985. Continental investigated Raytheon's claims and made payments on Raytheon's behalf, exhausting the limits of the Continental policies. App. 12a; R014:15-23.[7]

Raytheon estimates that its liability for contamination at the Mountain View facility totals $40 million. When the limits of the Continental policies were exhausted, Raytheon tendered the claims to petitioners, who issued policies of insurance excess to the Continental policies. Petitioners' policies incorporated the terms of the Continental policies. Thus, as a general proposition, if the Continental policies provided coverage, petitioners' policies would also provide coverage. *See* App. 13a; R012.

Petitioners refused to acknowledge coverage. Therefore, Raytheon filed suit in California state court, at San Francisco, seeking a declaratory judgment that petitioners must cover Raytheon for the environmental contamination claims that have arisen from the operations at Mountain View. App. 13a.

---

[7] Citations to "R___" are to the record filed by petitioners in the California Court of Appeal.

C. Facts Concerning the California Court of Appeal Decision That Petitioners Would Have This Court Review

1. Raytheon's Motion in the State Trial Court and the Evidence Relating to That Motion

As Lloyd's, London underwriters and London Market insurance companies, none of the petitioners is admitted to transact insurance in California. Petitioners' policies were obtained for Raytheon through an insurance broker, Frank B. Hall & Co. of Massachusetts, Inc. In 1984, when the policies were issued, Hall was licensed as a surplus line insurance broker in Massachusetts, but not in California. App. 12a, 14a.

After Raytheon filed the underlying suit for coverage, petitioners consented to jurisdiction by filing a general appearance and an answer in California state court. App. 13a. Thereupon, Raytheon filed a motion under Insurance Code § 1616, which provides:

> Before any nonadmitted foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, the insurer shall either (1) procure a certificate of authority to transact insurance in this state; or (2) give a bond in the action, suit or proceeding in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in the action, suit, or proceeding.

Raytheon asked the state trial court to require petitioners to come into compliance with § 1616. In support of the motion, Raytheon adduced facts showing that petitioners had transacted insurance in California without a proper

license when they issued and later administered the insurance policies at issue in Raytheon's suit for coverage. R280, 297.

Petitioners opposed the motion. They argued, among other things, that Insurance Code § 1616 did not apply. Insurance Code § 1620(a) exempts from Insurance Code § 1616 insurance sold in compliance with Insurance Code §§ 1760.5 and 1763. Sections 1760.5 and 1763 codify California law covering the lawful placement of surplus line insurance. R425-27.

However, petitioners failed in their effort to bring themselves under a surplus line exception to Insurance Code § 1616. Petitioners did not demonstrate in the record that their policies were issued in compliance with the specific, statutory prerequisites to a lawful, surplus line placement. Most notably, petitioners were forced to concede that the policies were not placed "by and through a surplus line broker licensed under" the chapter of the California Insurance Code dealing with surplus line brokers. *See* Insurance Code § 1761; R426.

Petitioners' opposition also fell short in another regard. Petitioners did not show that their policies were placed in conformity with the law of Massachusetts governing surplus line insurance. The demonstration that Hall was licensed in Massachusetts as a broker speaks to only one of several requirements that Massachusetts imposes on the transaction of surplus line insurance.[8]

---

[8] Some of the requirements of the Massachusetts surplus line insurance law are described in *Church of Christ in Lexington v. St. Paul Surplus Lines Ins. Co.*, 494 N.E.2d 45, 46 (Mass.App.Ct. 1986).

2. The State Trial Court's Findings and Order, Including a Description of Further Proceedings Yet to Occur in the State Trial Court Related to the Subject of Raytheon's Motion

The state trial court held two hearings and issued a written order. The court held that Insurance Code § 1616 applied because petitioners had in fact "transacted" insurance business in California when they issued the policies to Raytheon and later, when claims under those policies arose in California. In addition, while the court's order is silent on the subject, the court necessarily rejected petitioners' argument that Insurance Code § 1616 was inapplicable because the policies sold to Raytheon were surplus line insurance policies that were exempt from the California law requirement that the insurer be an admitted insurer. App. 2a.

The trial court determination that Insurance Code § 1616 applies is a threshold determination or interlocutory step toward final resolution of the issues raised by Raytheon's § 1616 motion. Further proceedings must still occur in the California trial court. First, § 1616 gives petitioners the option of securing admission (a license) from the Insurance Commissioner *or* posting a bond. Second, the state trial court has not as yet decided what the amount of any bond should be. The court granted petitioners discovery and continued to a later time the hearing on the amount of any bond that will have to be posted in the event petitioners do not secure admission to do insurance business in California. App. 3a.

3. Proceedings in the California Appellate Court Leading to the Written Opinion of the California Court of Appeal

Petitioners did not wait to let the trial court complete its work on the issues raised by Raytheon's § 1616 motion. Instead, the insurers filed a petition for writ of mandate seeking discretionary, interlocutory review from the California Court of Appeal, First Appellate District. The petition presented several arguments, one of which was that, under California law, Insurance Code § 1616 should not apply because the insurance at issue was surplus line insurance sold in Massachusetts to Raytheon, a company headquartered there.

The court of appeal denied the petition for writ of mandate with a statement of reasons. App. 6a. However, under California law, the summary denial of a petition for writ of mandate is not an expression on the merits of the issues tendered by the petition. *Kowis v. Howard*, 3 Cal.4th 888, 838 P.2d 250, 12 Cal.Rptr.2d 728 (1992).

Petitioners then filed a petition for review with the California Supreme Court. However, petitioners did not seek review of any issue of California law. In particular, petitioners did not pursue their argument that Insurance Code § 1616 was inapplicable because the insurance at issue was surplus line insurance and thus exempt from § 1616. App. 16a & n.6.

The California Supreme Court granted review and transferred the case back to the court of appeal with directions to that court to hear and decide the matter. Under California law, such an order is not an expression on the merits of any issue presented to the California

Supreme Court. *Popelka, Allard, McCowen & Jones v. Superior Court*, 107 Cal.App.3d 496, 500, 165 Cal.Rptr. 748 (1980).

4. The Actual Decision of the California Court of Appeal, Including the Limits and Analysis in That Decision

The legal analysis in the court of appeal opinion begins by pointing out that petitioners had presented at one time, but had thereafter waived, certain arguments concerning the interpretation of California insurance law. Waiver occurred under California appellate practice when petitioners failed to present to the California Supreme Court in the petition for review non-constitutional arguments resting on the proper interpretation of state law. App. 16a & n.6. One of the "waived issues" of California law is described in the opinion as the "Surplus Line Exemption to Section 1616." The court of appeal deemed it established that petitioners had not complied with California law validating surplus line placements of insurance. Per the court of appeal, petitioners "cannot claim exemption from section 1616, and their status under California law is that of nonadmitted insurers." App. 21a.

On another matter of appellate preservation, the court of appeal noted the existence of a "factual dispute over whether Hall procured the insurance in compliance with Massachusetts surplus line law . . . . " App. 20a & n.9. The record in this case does not show compliance with Massachusetts law.

Thereupon, the court of appeal addressed the only issue presented, namely, a due process challenge to the application of Insurance Code § 1616 to petitioners. App. 21a. Here, again, some care is needed to frame the issue that was preserved, presented, and decided. Petitioners did not argue that Insurance Code § 1616 is facially unconstitutional. In fact, petitioners conceded in briefs they filed that unlicensed insurers could be required to post bonds under § 1616. They told the California courts that a prior California court decision *(Trihedron Int'l Assurance, Ltd. v. Superior Court)* "was sound based on the facts of that case."[9] In *Trihedron*, a different panel of the California Court of Appeal held that Insurance Code § 1616 did not violate the Due Process Clause, either facially or as applied to a nonadmitted insurance company that sold insurance directly to a Californian, without the use of any broker. 218 Cal.App.3d at 946-48.

In view of these concessions, the narrow issue that the court of appeal took up was whether *Trihedron* was distinguishable. The court held *Trihedron* was not distinguishable because petitioners, like the insurer in *Trihedron*, had transacted insurance in California but had not complied with California law. In order to lawfully transact insurance in California, petitioners should have either obtained admission or complied with the California law requirements for placement of surplus line insurance. Petitioners did neither. Therefore, Insurance Code § 1616 applied to them. App. 24a.

---

[9] This quotation is taken from page 13 of a Supplemental Brief that petitioners filed with the California Court of Appeal on August 22, 1994. *See also* App. 23a & n.12.

Once the court of appeal decided that the *Trihedron* precedent could not be distinguished, the case was over because petitioners had conceded that *Trihedron* correctly analyzed the application of the Due Process Clause to § 1616. As the court of appeal noted: "[Petitioners] do not argue that *Trihedron* was wrongly decided." App. 23a & n.12.

D. Proceedings After the Court of Appeal Decision Leading to the Petition for Writ of Certiorari

After the court of appeal opinion was filed, an attorney for the California Department of Justice applied to the court of appeal for leave to submit a letter in support of the petition for rehearing. App. 29a. The letter urged the court of appeal to delete seven sentences from the opinion. The letter said that the California Department of Insurance had "communicated to the industry that a multi-state risk negotiated and placed outside of California under the authority of an insurance license issued by the state in which the placement is negotiated is not subject to California surplus line reporting requirements." App. 33a-34a.

This letter, generated at the time of rehearing in the court of appeal, marks the first time anyone ever suggested that an uncodified, unwritten, "mutual understanding" existed between surplus line insurers and state insurance regulators excusing insurers from any need to comply with parts of the California Insurance Code specifying how surplus line insurance should be placed.

The court of appeal refused to accept the letter for filing. This was an understandable ruling. App. 26a. The

court of appeal had just held in the written opinion that petitioners had waived their right to argue that they fell within a surplus line insurance exception to the application of Insurance Code § 1616. App. 19a. Any argument about a "mutual understanding" of the meaning of California insurance law was no longer open to petitioners because they had waived such an argument nearly a year earlier, when they petitioned the California Supreme Court for review and gave up at that time all of their claims based on the proper interpretation of state insurance law. *See* App. 16a & n.6.

Apart from waiver under state appellate court procedures, petitioners also faced the problem that they had never contended in the trial court that the Department of Insurance and surplus line insurers had a "mutual understanding." No evidence or indicia of this "mutual understanding," its source, content, scope, or application was ever developed. This Court's precedents indicate that a Fourteenth Amendment "property" right, when based on an "understanding," should be established through a fully developed factual record. *See, e.g., Perry v. Sindermann*, 408 U.S. 593 602, 603 (1972) (this Court refers to "other relevant facts" showing an entitlement and to "proof of such a property interest"). There is no record here.

This belated letter that was refused filing presents petitioners with a further problem, gingerly mentioned by them in a footnote. The letter *did not* assert that the court of appeal reached an erroneous result. On the contrary, the letter said that the language of the opinion should be modified because that language "is not necessary in reaching [the court of appeal's] holding that a

bond was required under Insurance Code section 1616." App. 34a. Thus, insofar as the letter was an attempt to convey a state insurance regulator's view to the state court of appeal, that court was plainly told that it had reached the right result and correctly applied Insurance Code § 1616 to the petitioners.

The court of appeal denied rehearing. App. 26a. Petitioners filed another petition for review with the California Supreme Court. They continued to press their very narrow line of argument. Again, as they had done in the court of appeal, petitioners endorsed the due process analysis of the *Trihedron* decision as correct, and sought only to distinguish themselves from *Trihedron* on a factual basis.[10]

Petitioners made other tactical decisions in their second petition for review. They did not seek California

---

[10] Petitioners wrote the following in their petition to the California Supreme Court, dated June 5, 1995 (pp. 13-14):

> The holding of *Trihedron* is premised on [Insurance Code] section 700's requirement that nonadmitted insurers transacting insurance in California were required to be admitted at the time they issued the policies. As to nonadmitted insurers illegally transacting business in California, *Trihedron* correctly held that [Insurance Code] section 1616 did "not deprive insurers of any substantial interest or existing right," but rather simply "encourage[d] compliance with the *already existing* statutory mandate." *Trihedron*, 218 Cal.App.3d at 948 (emphasis added). A requirement that a party comply with a pre-existing statutory obligation does not involve a deprivation of any property interest since there can be no property right premised on a violation of the law. [Citation omitted].

Supreme Court review of the court of appeal's holding that they had waived any right to contest the interpretation of California insurance law. Further, petitioners did not contest the court of appeal's order refusing to file the letter that supposedly espoused a "mutual understanding" of California insurance law shared with insurers by state regulators. Of significance on that matter, while petitioners rounded up other surplus line insurers, and persuaded them to send to the California Supreme Court self-serving letters in support of review, California insurance regulators did not send any letter to the Supreme Court or express any opposition to the decision of the court of appeal.

The petition was unsuccessful. The California Supreme Court denied review, and a timely petition for writ of certiorari was filed with this Court. App. 28a.

REASONS TO DENY THE WRIT

A. Applying the Rule 10(c) Criteria, There Is No Basis for Certiorari. There Is No Conflict with Any Decision of This Court. There Is No Important, Properly Presented Question of Federal Law.

Petitioners contend that the court of appeal decision conflicts with cases from this Court requiring predeprivation hearings before property rights are taken or impaired. This argument misstates this Court's precedents and rests on a mischaracterization of the findings of fact and conclusions of California law adopted by the California courts.

1. A Settled Line of Supreme Court Precedent Is Consistent with the Rulings of the California Courts

This Court has held that no person has a liberty or property right to transact insurance in any state. States can exclude persons entirely from transacting any insurance within state borders. In lieu of total exclusion, states may impose all manner of lesser restrictions. As Justice Frankfurter wrote for the Court, in *Osborn v. Ozlin*, 310 U.S. 53, 66 (1940):

> In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, . . . or might take "the whole business of banking under its control," . . . . If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards.[11]

California also has the power to arrest violations of state insurance law that have already occurred. One way California may exercise this power is by closing state courts to persons who transact unlicensed business activities in violation of state law. This Court has consistently

---

[11] *See also Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 72-73 (1954); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 181-82 (1964).

upheld the constitutionality of state statutes closing state civil courts to unlicensed businesses.[12]

This power was directly applied to unlicensed insurance companies by Justice Brandeis' opinion in *Bothwell v. Buckbee-Mears Co.*, 275 U.S. 274, 277 (1927):

> Minnesota had the power to prohibit the Employers' Mutual Co. from doing business within the State without first complying with the prescribed conditions, and could refuse the aid of its courts in enforcing a contract which involved violation of its laws. . . .

The California courts acted within these precedents. They applied Insurance Code § 1616 to a case concerning insurance policies that were issued in violation of California law. They reached decision after a hearing and evidence showing that petitioners repeatedly transacted insurance in California in violation of specific requirements of California insurance law.

2. Petitioners' Assertion of a Property Interest Impaired Without Procedural Due Process Is Wishful and Trivial in View of the Rulings of the California Courts

A Fourteenth Amendment procedural due process claim presupposes a property or liberty interest that has been taken or impaired without an adequate hearing.

---

[12] *See, e.g., Interstate Amusement Co. v. Albert*, 239 U.S. 560, 568 (1916); *Chattanooga Nat'l Bldg. & Loan Ass'n v. Denson*, 189 U.S. 408, 417 (1903); *see also Eli Lilly & Co. v. Sav-on-Drugs, Inc.*, 366 U.S. 276, 279-81 (1961); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 210 (1944).

Petitioners' claim to this Court's review is wishful and trivial because the California courts decided under state law that no property or liberty interest ever allowed petitioners to deal in insurance in California.

Petitioners argue in this Court that they had a property right to transact insurance in California based on a supposed "mutual understanding" between the surplus line insurance industry and the California Department of Insurance. Thus, petitioners say that, by applying § 1616 to them, California is taking away, without an adequate hearing, a supposed property right to transact unlicensed insurance, allegedly conferred by a "mutual understanding" between California insurance regulators and surplus line insurers.

This argument is foreclosed. The existence of a property right under the Fourteenth Amendment is a question of state law. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The California courts held that, under state law, petitioners had no right to transact insurance in California on *any* basis, including on a surplus line basis. The state courts determined that petitioners were not, at any time, entitled to transact insurance under state law.

3. The Question Presented by the Petition Is Insubstantial in View of Petitioners' Concessions Below that Insurance Code § 1616 Could Be Constitutionally Applied to an Insurance Transaction that Is Unlawful Under State Law.

Petitioners have not preserved for this Court's review a substantial question of constitutional law. Theirs has

always been a fact-oriented squabble, framed by their concession that Insurance Code § 1616 is generally constitutional under the Due Process Clause.

The California Court of Appeal held that the *Trihedron* case applied to petitioners. App. 23a-24a. Petitioners admitted below, at least twice, that *Trihedron* was correctly decided. *Trihedron* held that Insurance Code § 1616 is facially constitutional under the Due Process Clause. *Trihedron* also held that § 1616 was constitutional as applied to a foreign insurer who transacted insurance in California illegally, by mail, without a license. 218 Cal.App.3d at 946-48.

By conceding that *Trihedron* is correct whenever applied to the "illegal" transaction of insurance in California, petitioners failed to preserve for this Court's consideration any substantial legal issue under the Due Process Clause. Petitioners' transaction of insurance was no less "illegal." As the court of appeal explained: "the issuance of the policies in the present case is just as 'illegal' as in *Trihedron*. By 'illegal,' [petitioners] mean the policies were issued to California insured by a nonadmitted insurer. That is exactly the case herein." App. 24a.

This Court does not sit to apply settled law to distinctive facts. By admitting that Insurance Code § 1616 could be constitutionally applied to the transaction of insurance in violation of state law, petitioners drained from this case any substantial question of constitutional law.

4. Petitioners' Current Theory of Constitutional Deprivation Was Waived During Proceedings in State Court

Of course, this Court is in no position to disregard the determinations of California law adopted by the California courts. Of equal importance, petitioners have waived the claim that they have a "right" to transact surplus line insurance in California. They base their "right" on a supposed "mutual understanding" with California insurance regulators. But this argument was waived when it was not presented in proper fashion to the California courts.

California courts deem an argument waived if it is not presented in the trial court and renewed in the appellate court. *See, e.g., Richmond v. Dart Industries, Inc.*, 196 Cal.App.3d 869, 874, 242 Cal.Rptr. 184 (1987). This Court honors and enforces state law waiver principles when considering a certiorari petition. *See, e.g., Beck v. Washington*, 369 U.S. 541, 549-54 (1962).

Petitioners never presented to the state trial court any argument, evidence, or indicia of a "mutual understanding" about surplus line insurance regulation that would be relevant to the application of § 1616. Petitioners have never cited, and do not now cite, any California statute, rule, regulation, or precedent that embodies or refers to such a mutual understanding. Waiver under California law is thereby established.

This Court's own precedents cut further against certiorari. When a Fourteenth Amendment property interest is claimed to rest on a "mutual understanding," evidence of the existence of the understanding must be adduced.

See Perry v. Sindermann, 408 U.S. at 601, 602, 603. There is no evidence here. This Court should not render a constitutional adjudication when the record lacks facts that would be necessary to frame the constitutional issue.

There is more. The California Court of Appeal opinion does not discuss any "mutual understanding" of state insurance law. The opinion is silent because petitioners did not claim there to be a "mutual understanding" giving rise to a right to transact unlicensed insurance.[13]

Petitioners' waiver is broader than just a failure to articulate a theory of state insurance law favorable to them. The court of appeal held that petitioners had waived, under state appellate procedure, the right to pursue any arguments based on the interpretation of state insurance laws. Included within this waiver is any argument challenging petitioners' status as non-admitted insurers who had failed to comply with California surplus line insurance laws. App. 21a. And petitioners acquiesced in this waiver holding; they did not challenge this holding in their second petition to the California Supreme Court.

No better demonstration of waiver can be found than this: petitioners' belated "mutual understanding" argument is based entirely on material that is extraneous to the record. The claimed "mutual understanding" is set

---

[13] The submission of a letter from a non-party in support of a petition for rehearing does not constitute preservation of an argument under California appellate procedure. *See, e.g., County of Sacramento v. Loeb*, 160 Cal.App.3d 446, 459-60 n.5, 206 Cal.Rptr. 626 (1984).

out in a letter that the court of appeal refused to accept for filing. App. 26a.

5. Petitioners' Theory of Constitutional Deprivation Rests on Misapprehensions of Law and Fact

Waiver aside, petitioners' "mutual understanding" argument is flawed in its substance.

The California Insurance Code specifies that unlicensed surplus line insurers may only operate in California through California-licensed brokers. Both in this case, and in a recent Ninth Circuit opinion, the courts have held this to be a mandatory feature of California's Insurance Code. *See Bank of San Pedro*, 53 F.3d at 276. A California administrative agency could not adopt an "understanding" of state law that is contrary to a state statute. *See Evans v. Unemployment Ins. Appeals Board*, 39 Cal.3d 398, 407, 703 P.2d 122, 216 Cal.Rptr. 782 (1985). The "mutual understanding" claimed by petitioners is dubious and counter-intuitive because it is contrary to the California Insurance Code.

In any event, even if a mutual understanding existed, it does petitioners no good. Petitioners never demonstrated that they placed insurance in conformity with the surplus line insurance requirements of Massachusetts law. Assuming, *arguendo*, that California would stay its regulatory hand in a case where surplus line insurers complied with the law of another state, petitioner did not show their compliance with any other state's law. Perhaps this is one reason why the infamous letter containing the supposed "mutual understanding" also advised

that the state court of appeal had reached the correct outcome by applying Insurance Code § 1616 to petitioners.

6. There Is No Merit in Petitioners' Other Assertions of Conflict with This Court's Precedents

Petitioners cite several precedents that are entirely inapt. In *Bell v. Burson*, 402 U.S. 535 (1971), for example, the issue concerned the process due before the state could require an uninsured *but licensed* driver to post a bond following an automobile accident. Justice Brennan emphasized that the state could refuse to issue a driver's license in the first instance to uninsured persons. *Bell* establishes a difference of constitutional dimension between state power over unlicensed persons and state power to revoke a license that has already been granted. Petitioners concede as much. They say that they fit within the *Bell* precedent because they claim to have had a "license to issue surplus line insurance. . . . " Of course, that assertion is not supported and is contrary to the determination of the California courts. Furthermore, as the court of appeal noted, the "*Bell* argument" was never raised in the California trial court. *See* App. 19a & n.8.

Petitioners discuss "exigent circumstances" and the need, in cases of exigency, for a prompt post-deprivation hearing when property rights are affected. None of these cases are material. These cases presuppose an existing liberty or property interest that is taken or impaired. Petitioners have no such interest.

Also distinguishable are this Court's cases involving attachments and property seizures.[14] None of these cases involved unlicensed persons engaging in sensitive business activities in violation of state licensing law.

Petitioners abandoned in the California courts their argument that the application of Insurance Code § 1616 somehow represented an unwarranted, extraterritorial application of California insurance law, in violation of the Due Process Clause. *See* App. 19a; *State Board of Ins. v. Todd Shipyards*, 370 U.S. 451 (1962).

Petitioners imply in a footnote that the constitutionality of Insurance Code § 1616 rests on the pedigree of a tarnished case, *Ownbey v. Morgan*, 256 U.S. 94 (1921). *See* App. 241 & n.19. Of course, petitioners conceded below the facial constitutionality of Insurance Code § 1616, leaving one wondering about the point of their citation to *Ownbey*. *See* App. 23a & n.12. In any event, since *Ownbey*, this Court has embraced the power of states to regulate insurance. Whatever the continued vitality of *Ownbey*, § 1616 is a lawful exercise of state police power over the insurance business.

Finally, petitioners claim that the unpublished decision here might jeopardize the surplus line insurance industry. In support, petitioners cite statements by surplus line insurers. App. 36a-100a. Apart from the obvious bias, there are no facts supporting the gloomy forecast.

---

[14] *See, e.g., Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Connecticut v. Doehr*, 501 U.S. 1 (1991); *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

For example, petitioners' complaint about the theoretical cost of surety bond premiums in this case overlooks the fact that petitioners can recover this expense under California law if they prevail in the underlying insurance coverage litigation. *See* California Code of Civil Procedure § 1033.5(a)(6). Moreover, petitioners' dire lamentations assume that unlicensed insurers will opt to post bonds, rather than obtain licenses. The petition fails to explain why the surplus line insurance industry is unable or incapable of obtaining state admission or functioning through state-licensed brokers.[15]

B. Applying the Rule 10(b) Criteria, There Is No Basis for Certiorari. There Is No Conflict Between the California Court Decision and the Decision of Any Other Court.

Petitioners do not claim that the court of appeal's unpublished, non-precedential decision is in conflict with the decision in any other case. In fact, lower courts have consistently upheld the constitutionality of Insurance Code § 1616 and other, similar state statutes.[16]

---

[15] Petitioners argue that individual underwriters are ineligible to be admitted insurers in California because they are not incorporated. This point has negligible significance. Approximately 90% of the coverage at issue was written by London Market insurance *companies*, not individual underwriters. Moreover, as for individuals, the adoption of an incorporated business form can be done with relative ease.

[16] *See Trihedron*, 218 Cal.App.3d 934 (1990); *Mid-American Indemnity Ins. Co. v. King*, 1995 Tex. LEXIS 123 (Tex. July 7, 1995).

C. Certiorari Should Also Be Denied Because Petitioners Have Not Established Jurisdiction in This Court

Another reason to deny certiorari is petitioners' inability to establish this Court's jurisdiction.

This Court may review the "final judgments or decrees" of a state's highest court. *See* 28 U.S.C. § 1257. "Finality" is a question of federal law.

Petitioners claim jurisdiction under the decision in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *Cohen* involved a trial court order refusing to require the plaintiff to post security. Justice Jackson identified two key hallmarks of a final decision. *First*, the rule of finality "disallow[s] appeal from any decision which is tentative, informal, or incomplete. * * * So long as the matter remains open, unfinished, or inconclusive, there may be no intrusion by appeal." *Second*, the requisite finality is missing, "even from fully consummated decisions, where they are all but steps towards final judgment in which they will merge." *Id.* at 546. *Cohen* held that an order refusing to require a plaintiff in a shareholder derivative action to post security was "final" and appealable under federal law as the final resolution of a collateral matter.

Cohen is distinguishable.[17] First, the state courts have not completed their work on Raytheon's motion under Insurance Code § 1616. It has yet to be determined

---

[17] While *Cohen* involves an interpretation of the concept of "finality" under 28 U.S.C. § 1291, this Court has sanctioned reliance on § 1291 cases when analyzing finality under § 1257.

whether some or all of the petitioners will purge themselves of the trial court's existing order by obtaining admission to transact insurance in California. Second, as for those insurers who do not secure admission, the state trial court has yet to determine the amount of the bond. That will only be done after certain discovery is completed and another hearing is held.

In short, petitioners do not satisfy the first of the tests of finality set out in *Cohen*. The state courts have not yet completed their disposition of Raytheon's motion under Insurance Code § 1616. Petitioners cite no case conferring finality on an order that leaves unresolved the amount of the bond, and also leaves a litigant a possible avenue to avoid the bonding requirement altogether. By contrast, *Cohen* finally disposed of the issue of security by denying any security.

The narrow *Cohen* exception to the final judgment rule ought not be widened. A widening would encourage premature certiorari petitions in cases where the amount of security is open. This Court should not be asked to consider constitutional questions when the lower courts are still crafting their orders and still settling the consequences that flow from those orders.

Jurisdiction is doubtful for another reason. Even in cases where the lower courts have completely disposed of an issue concerning prejudgment security, *Cohen* does not automatically confer "finality." Since *Cohen*, several cases have suggested that orders *requiring* security to be posted are less prone to be collateral orders under *Cohen*. There

is reason to limit *Cohen* to orders *denying* a request for security. As the Sixth Circuit has written:

> The issue of whether prejudgment security devices are immediately appealable under Cohen has been extensively litigated. The courts of appeals have uniformly held that orders granting such security are not immediately appealable under Cohen, reasoning that there is no risk of important loss if prejudgment security is granted since the interest of both parties is adequately protected.

Hitachi Zosen Clearing, Inc. v. Tek-Matik, Inc., 846 F.2d 27, 28 (6th Cir. 1988).

CONCLUSION

The petition for writ of certiorari should be denied.

DATED: December 13, 1995

Respectfully submitted,

THOMAS M. PETERSON
BROBECK, PHLEGER & HARRISON
One Market, Spear Tower
San Francisco, CA 94105
Telephone: 415-442-0900

Attorneys for Respondent
Raytheon Company

SELECTED PORTIONS
OF THE
CALIFORNIA INSURANCE CODE

§ 700. Certificate of Authority to Transact Business; Compliance; Violation

(a) A person shall not transact any class of insurance business in this state without first being admitted for that class. Admission is secured by procuring a certificate of authority from the commissioner. The certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this state prerequisite to its issue.

(b) The unlawful transaction of insurance business in this state in willful violation of the requirement for a certificate of authority is a public offense punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by fine not exceeding one hundred thousand dollars ($100,000), or by both, and shall be enjoined by a court of competent jurisdiction on petition of the commissioner.

(c) After the issuance of a certificate of authority, the holder shall continue to comply with the requirements as to its business set forth in this code and in the other laws of this state.

* * *

§ 703. Acts constituting misdemeanors

Except when performed by a surplus line broker, the following acts are misdemeanors when done in this State:

(a) Acting as agent for a nonadmitted insurer in the transaction of insurance business in this State.

(b) In any manner advertising a nonadmitted insurer in this State.

(c) In any other manner aiding a nonadmitted insurer to transact insurance business in this State.

In addition to any penalty provided for commission of misdemeanors, a person violating any provision of this section shall forfeit to this State the sum of five hundred dollars, together with one hundred dollars for each month or fraction thereof during which he continues such violation.

ARTICLE 4

ACTIONS AGAINST NONADMITTED INSURERS

§ 1610. Commissioner's Automatic Appointment as Attorney; Service of Process
§ 1611. Actions Requiring Commissioner's Appointment
§ 1612. Service of Process
§§ 1613-1615. Repealed
§ 1616. Requirements Before Filing of Pleading
§ 1617. Postponement for Defense and Compliance
§ 1618. Motion to Quash or Set Aside Service
§ 1619. Irritating Refusal to Pay Claim; Attorney's Fee
§ 1620. Applicability When Attorney Resident of State; Maintenance of Sufficient Securities or Filing of Bond

§ 1610. Commissioner's Automatic Appointment as Attorney; Service of Process

Any of the acts described in Section 1611, when effected in this State, by mail or otherwise, by a foreign or alien insurer which is nonadmitted at the time of the solicitation, issuance or delivery by it of contracts of insurance to residents of, or to corporations authorized to do business in, this State, is equivalent to and shall constitute an appointment by such insurer of the commissioner and his successor or successors in office to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding instituted

by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

§ 1611. Actions Requiring Commissioner's Appointment

The acts referred to in Section 1610 are:

(1) The issuance or delivery to residents of, or to corporations authorized to do business in, this State of contracts of insurance insuring (a) the lives or persons of residents of this State physically present herein at the time of such issuance or delivery or (b) property or operations located in this State.

(2) The solicitation of applications for such contracts.

(3) The collection of premiums, membership fees, assessments or other considerations for such contracts.

(4) Any other transaction of business arising out of such contracts.

§ 1612. Service of Process

Such service of process may be made as provided in Article 1 (commencing with Section 12919) of Chapter 2 of Division 3.

* * *

§ 1616. Requirements Before Filing of Pleading

Before any nonadmitted foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, the insurer shall either (1) procure a certificate of authority to transact insurance in this state; or (2) give a bond in the action, suit or proceeding in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in the action, suit, or proceeding.

§ 1617. Postponement for Defense and Compliance

The court in any action, suit, or proceeding, in which service of process is effected in the manner provided in Section 1612 may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Section 1616 and to defend such action.

§ 1618. Motion to Quash or Set Aside Service

Nothing in Section 1616 is to be construed to prevent a nonadmitted foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Section 1612 on the ground that such insurer has not done any of the acts described in Section 1611.

§ 1619. Irritating Refusal to Pay Claim; Attorney's Fee

In any action against a nonadmitted foreign or alien insurer upon a contract of insurance issued or delivered in this State to a resident thereof or to a corporation

authorized to do business therein, if the insurer has failed for 30 days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include such fee in any judgment that may be rendered in such action. Such fee shall not exceed 12-1/2 percent of the amount which the court or jury finds the plaintiff is entitled to recover against the insurer, but in no event shall such fee be less than twenty-five dollars ($25). Failure of an insurer to defend any such action shall be deemed prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

§ 1620. Applicability When Attorney Resident of State; Maintenance of Sufficient Securities or Filing of Bond

(a) The provisions of the preceding sections of this article shall not apply to any action, suit or proceeding against any unauthorized foreign or alien insurer arising out of any contract of insurance effected in accordance with Sections 1760.5 and 1763 where such contract contains a provision designating a resident of this state or any firm of which one member is a resident of this state to be its true and lawful attorney upon whom may be served all lawful process in any such action, suit or proceeding.

(b) In any such action, suit or proceeding arising out of any such contract of insurance, the court may require the insurer to file a bond, in an amount sufficient

to secure the payment of any final judgment which may be rendered unless the insurer makes a showing satisfactory to the court that it maintains in a state of the United States funds or securities in trust or otherwise, sufficient and available to satisfy any such final judgment and that it will pay the judgment without requiring suit to be brought thereon in the state where the securities or funds are located.

CHAPTER 6

SURPLUS LINE BROKERS

§ 1760. Who May Deal with Nonadmitted Insurer
§ 1760.5 Applicability of Chapter; Procedure for Special Lines Surplus Line Broker License; Reports; Penalty for Violation
§ 1761. Insurance to Be Placed with Nonadmitted Insurer Only Through Surplus Line Broker
§ 1762. Repealed
§ 1763. Conditions Precedent to Placing Insurance with Nonadmitted Insurer
§ 1763.5. Conditions Precedent to Placing Insurance with Nonadmitted Insurer-Automobile Assigned Risk Coverage
§ 1764. Certificates Evidencing Placement of Insurance with Nonadmitted Insurer
§ 1764.1. Policy Issued by Nonadmitted Insurer; Mandatory Disclosure Statement
§ 1764.2 Requirements Before Issuance of Certificate
§ 1764.3. Delivery of Insurance Policy
§ 1764.4. Authentication of Policy Documents; Obligation Joint or Several
§ 1764.5. Insurance Subject to Cancellation for Violation
§ 1764.6 Reserved
§ 1764.7. Violation Is Public Offense
§ 1765. Requirements for Application and Renewal of License; Fees
§ 1765.1. Coverage Can Be Placed by Surplus Line Broker with Nonadmitted Insurer in Certain

Cases – Evidence of Financial Stability – Foreign Insurer – Documents Produced – Removal from List of Eligible Surplus Line Insurers – Fees – Definitions
§ 1765.2. Requirements of Corporation for Surplus Line Broker's License
§ 1765.3. Proving Competency to Be Licensed
§ 1765.4. Conditions for Automatic Denial of License
§ 1766. Premium Paid to Surplus Line Broker Deemed Paid to Insurer
§ 1767. Report of Broker's Offices in State; Addresses and Principal Office
§ 1768. Maintenance of Records
§ 1769. List of Admitted Insurers Refusing Insurance
§ 1770. Examination of Broker's Affairs by Commissioner
§ 1771. Payment of Examination Expense
§ 1772. Suits Involving Surplus Line Brokers – Remedies
§ 1773. Repealed
§ 1774. Filing and Contents of Annual Statement
§ 1775. Reports and Statements Made on Blanks
§ 1775.1. Quarterly Installments of Annual Tax; Exception
§ 1775.2. Notice and Forms for Quarterly Tax Installments
§ 1775.3. Time and Procedure for Making Quarterly Tax Installments

§ 1775.4. Computation of Quarterly Tax Installments; Penalty for Untimely Payments; Extensions
§ 1775.5. Determination of Annual Gross Premium Tax; Penalty for Untimely Payments; Extensions
§ 1775.6. Procedure for Transmission of Funds to State Treasury
§ 1775.7. Appropriation of Funds
§ 1776. Violations and Penalties
§ 1776.8. Payment of Taxes by Electronic Funds Transfer
§ 1777. Repealed
§ 1778. Conditions for New License After Revocation
§ 1779. Examination of Documents; Penalty for Refusal
§ 1780. Notification of Change of Address

§ 1760. Who May Deal with Nonadmitted Insurer

(a) Any person may negotiate and effect insurance to protect himself, herself, or itself against loss, damage, or liability with any nonadmitted insurer.

(b) Every person that effects insurance governed by this chapter shall pay the tax imposed by Part 7.5 (commencing with Section 13201) of Division 2 of the Revenue and Taxation Code.

§ 1761. Insurance to Be Placed with Nonadmitted Insurer Only Through Surplus Line Broker

Except as provided in Sections 1760 and 1760.5, a person within this State shall not transact any insurance

on property located or operations conducted within, or on the lives or persons of residents of this State with nonadmitted insurers, except by and through a surplus line broker licensed under this chapter and upon the terms and conditions prescribed in this chapter.

* * *

§ 1763. Conditions Precedent to Placing Insurance with Nonadmitted Insurer

(a) A surplus line broker may solicit and place insurance, other than as excepted in Section 1761, with nonadmitted insurers only if that insurance cannot be procured from insurers admitted for the particular class or classes of insurance and that actually write the particular type of insurance in this state. Each surplus line broker shall be responsible to ensure that a diligent search is made among insurers that are admitted to transact and are actually writing the particular type of insurance in this state before procuring the insurance from a nonadmitted insurer. Each surplus line broker shall file with the commissioner or his or her designee, within 60 days of placing any insurance with a nonadmitted insurer, a written report, that shall be kept confidential, regarding the insurance. This report shall include the name and address of the insured, the identity of the insurer or insurers, a description of the subject and location of the risk, the amount of premium charged for the insurance, a copy of the declarations page of the policy or a copy of the surplus line broker's certificate or binder evidencing the placement of insurance, and other pertinent information that the commissioner may reasonably require. In addition, each surplus line broker shall file a

standardized form to be prescribed by the commissioner setting forth the diligent efforts to place the coverage with admitted insurers and the results of these efforts. The form shall be signed by a person licensed under this code who has made the diligent search required by this section or who supervised an unlicensed person or persons who actually conducted the search. The insurance shall not be placed with a nonadmitted insurer for the purpose of procuring a rate lower than the lowest rate that will be accepted by any admitted insurer except as provided by subdivision (c). The commissioner may make and publish reasonable rules and regulations, consistent with this chapter, in respect to transactions governed thereby and the basis or bases for his or her determinations hereunder.

(b) It shall be prima facie evidence that a diligent search among admitted insurers has been made if the standardized form filed as required by subdivision (a) establishes that three admitted insurers that actually write the particular type of insurance in this state have declined the risk, or that fewer than three admitted insurers actually write the particular type of insurance. The commissioner, or his or her designee, may review the form for the accuracy of the information provided on it, including, but not limited to, whether the listed insurers actually write that type of insurance, and whether the three insurers declined the risk. The commissioner may take disciplinary action against the person signing the form for any misrepresentation made in the form due to the negligence of or the result of an intentional act by that person or the person or persons who actually conducted

the search. Those actions may include any action authorized to be taken against a licensed person by this code. Nothing in this subdivision shall preclude the commissioner or his or her designee from directing the surplus line broker to conduct a further or additional search among admitted insurers for similar placements in the future.

(c) It shall be conclusively presumed that insurance is placed in violation of this section if the insurance is actually placed with a nonadmitted insurer at a lower rate of premium or lower premium than the lowest rate of premium or the lowest premium that could be obtained from an admitted insurer unless, at the time the insurance attaches, there is filed with the commissioner a statement describing the insurance, specifying the rate and the nearest procurable rates from admitted insurers. The statement shall include an explanation of the reasons that the insurance must be placed with a nonadmitted insurer even though it is available from an admitted insurer. Unless the commissioner, or his or her designee, within five days after that filing notifies the filing broker that in his or her opinion the placing of the insurance constitutes a violation of this section, the broker may thereafter maintain in effect that insurance. If within that five-day period the commissioner notifies the surplus line broker that the insurance is in violation of this section and orders the broker to effect termination of that insurance within 10 days from the notice, and the broker fails or refuses to effect that termination, that failure or refusal is a violation of this section.

(d) Statements filed under this section are not subject to public inspection unless the commissioner determines that the public interest or the welfare of the filing broker requires that any statement be made public.

(e) For purposes of this section, "type of insurance" means the hazard or combination of hazards covered by a contract of insurance.

(f) Notwithstanding subdivision (a), this section shall not apply to insurance issued or delivered in this state by a nonadmitted Mexican insurer by and through a surplus line broker affording coverage exclusively in the Republic of Mexico on property located temporarily or permanently in, or operations conducted temporarily or permanently within, the Republic of Mexico.

§ 1764. Certificates Evidencing Placement of Insurance with Nonadmitted Insurer

A licensed surplus line broker may issue certificates evidencing the placement of insurance with a nonadmitted insurer. Such certificates shall be in the name of such surplus line broker and not in the name of such nonadmitted insurer, and shall contain all of the matters specified in Insurance Code Section 381.

§ 1765. Requirements for Application and Renewal of License; Fees

(a) A license under this chapter shall be applied for and renewed by the filing with the commissioner of a written application therefor, in accordance with the provisions of Section 1652.

(b) Subject to subdivision (f) of this section, the commissioner shall issue a license authorizing any applicant who is trustworthy and competent to transact an insurance brokerage business in such manner as to safeguard the interest of the insured, to act as a surplus line broker from the date of the license until the expiration date specified in Section 1630.

(c) An applicant for a surplus line broker's license shall, as part of the application and a condition of the issuance of the license, file a bond to the people of the State of California in the sum of fifty thousand dollars ($50,000), conditioned that the licensee will fully and faithfully comply with the requirements of this chapter, and all applicable provisions of this code. The bond shall be subject to the provisions of Sections 1662 and 1663.

(d) The filing fee for a license to act as a surplus line broker, and naming up to two natural persons on the license, shall be two hundred ninety-five dollars ($295) per year, or for any initial fractional license year. If more than two natural persons are named on the license, an additional fee of eighty-three dollars ($83) per year, or for any initial fractional license year, shall be paid for each additional natural person named on the license.

(e) Such license shall be renewed in accordance with and subject to, the provisions of Sections 1717, 1718, 1719, and 1720.

(f) The commissioner may deny, suspend or revoke any license applied for or granted pursuant to this chapter on all or any one of the grounds and in accordance with the procedures provided in Article 6 (commencing

with Section 1666) and Article 13 (commencing with Section 1737) of Chapter 5, whenever the commissioner finds that the applicant or licensee has committed a violation of any provision of this code.

§ 1768. Maintenance of Records

Such broker shall keep in this state complete records of the business transacted by him with nonadmitted insurers under his license as a surplus line broker. After notice and hearing, the commissioner shall promulgate reasonable rules and regulations specifying the manner and type of records to be maintained by surplus line brokers and the location or locations where such records shall be kept.

§ 1769. List of Admitted Insurers Refusing Insurance

Whenever required so to do by the commissioner, such surplus line broker shall furnish to the commissioner a list of the admitted insurers from which the entire amount of insurance desired was not obtainable.

§ 1770. Examination of Broker's Affairs by Commissioner

The commissioner, whenever he deems necessary, may examine the books and accounts of any surplus line broker for the purpose of determining whether or not the broker is conducting his business in accordance with the provisions of this chapter. For the purpose of making such examination such broker shall allow the commissioner free access at all times to all the broker's books

and papers, and the commissioner shall thoroughly inspect and examine all of the broker's affairs.

§ 1774. Filing and Contents of Annual Statement

On or before the first day of April of each year the surplus line broker shall file with the commissioner a sworn statement of all business transacted under his license during the last preceding calendar year. Such statement shall contain accounts of the gross premiums received and return premiums, separately stated.

§ 1775.5. Determination of Annual Gross Premium Tax; Penalty for Untimely Payments; Extensions

Every surplus line broker shall annually, on or before the first day of April of each year pay to the Insurance Commissioner for the use of the State of California a tax of 3 percent of the gross premiums upon business done by him under authority of his license during the preceding calendar year, less 3 percent of return premiums paid by him in that year by reason of cancellation or reduction of premium, excluding gross premiums paid and return premiums paid by him upon business governed by the provisions of Section 1760.5. If during any calendar year 3 percent of such return premiums paid by a surplus line broker exceed 3 percent of the gross premiums upon such business done by him in that year, then he may either carry forward such excess to the next succeeding year and apply it as a credit against 3 percent of gross premiums on such business done by him in such succeeding year, or he may elect to receive, and thereupon be paid a refund equal to the amount of taxes theretofore paid by

him on such excess of return premiums paid over gross premiums received.

For the purpose of determining such tax, the total premium charged for all such nonadmitted insurance placed in a single transaction with one underwriter or group of underwriters, whether in one or more policies, shall be allocated to this state in such proportion as the total premium on the insured properties or operations in this state, as computed on the exposure in this state on the basis of any single standard rating method in use in all states or countries where such insurance applies, bears to the total premium so computed in all states or countries in which such nonadmitted insurance may apply. This provision shall not apply to interstate motor transit operations conducted between this and other states. With respect to such operations surplus line tax shall be payable on the entire premium charged on all nonadmitted insurance, less

A. Such portion of the premium as is determined, as herein provided, to have been charged for operations in other states taxing such premium on operations in such states of an insured maintaining its headquarters office in this state;

B. The premium for any operations outside of this state of an insured who maintains a headquarters operating office outside of this state and a branch office in this state.

A penalty of 10 percent of the amount of the payment due shall be levied upon and paid by any surplus line broker who fails to make the necessary payment within the time required, plus interest at the rate of 1 percent per

calendar month or fraction thereof, from April 1, the due date of the annual tax, until the date the payment is received by the commissioner. The commissioner, upon a showing of good cause, may extend for not to exceed 30 days, the time for filing a tax return or paying any amount required to be paid with the return. The extension may be granted at any time, provided that a request therefor is filed with the commissioner within, or prior to, the period for which the extension may be granted.

Any surplus line broker to whom an extension is granted shall, in addition to the tax, pay interest at the rate of 1 percent per month or fraction thereof from April 1, until the date of payment. The commissioner may remit the penalty in a case where the commissioner finds, as a result of examination or otherwise, that the failure of or delay in payment arose out of excusable mistake or excusable inadvertence.

For any part of a payment required by this section or by Section 1775.4 which was not made within the time required by law, when such nonpayment or late payment was due to fraud on the part of the broker, a penalty of 25 percent of the amount unpaid shall be added thereto, in addition to all other penalties otherwise imposed.